SULAIMAN BIN KADIR v. PUBLIC PROSECUTOR

[A.Cr.J. (Harun J.) December 16, 1975]
[Kuala Lumpur — Selangor Criminal Application No. 25 of 1975]

Criminal Law and Procedure — Bail — Applicant charged with rape in the Special Sessions Court — Application for bail pending trial refused — Whether application to High Court against said decision under section 389 of the Criminal Procedure Code proper — Criminal Procedure Code (F.M.S. Cap. 6), ss. 388(i), 389 & 394.

Criminal Law and Procedure — Bail — Unfettered discretion of High Court to grant bail as distinguished from limited powers of Subordinate Court — Circumstances under which bail should be allowed.

The applicant was arrested on August 20, 1975, and charged with rape under section 376 of the Penal Code in the Special Sessions Court at Kuala Lumpur. The trial had been fixed for February 13 and 14, 1976. On November 7, 1975, the applicant applied for bail pending trial but the learned President of the Special Sessions Court refused it under section 388(i) of the Criminal Procedure Code. The applicant asked the High Court to exercise its discretion to grant bail on exceptional and very special reasons. The learned Deputy Public Prosecutor contended that the application should have been brought by Notice of Appeal under section 394 and not, as it was done, under section 389.

Held: (1) the learned President was correct in refusing bail; a subordinate court had no power to grant bail if there were reasonable grounds for believing that an accused person had been guilty of an offence punishable with death or life imprisonment;

(2) if a person should not be kept in custody for a moment longer than was necessary, than the speedy procedure of section 389 of the Criminal Procedure Code rather than that of an appeal was obviously indicated;

(3) as this application arose out of a refusal to grant bail, the provisions of section 389 applied;

(4) in this case as there were exceptional and special reasons, the court could exercise its discretion and grant bail.

Case referred to:-

(1) *Shanmugam* v. *Public Prosecutor* [1971] 1 M.L.J. 283.

CRIMINAL APPLICATION

P. G. Segran for the applicant.

Ee Chin Seng (Deputy Public Prosecutor) for the public prosecutor.

Harun J.: This is an application for bail pending trial. The applicant was arrested on August 20, 1975 and charged with rape under section 376 of the Penal Code in the Special Sessions Court at Kuala Lumpur. The trial has been fixed for February 13 and 14, 1976. On November 7, 1975 the applicant applied for bail pending trial but the learned president of the Special Sessions Court refused it under section 388(i) of the Criminal Procedure Code. The learned president is correct in refusing bail. There is abundant authority, the most recent being *Shanmugam* v. *Public Prosecutor*,[1] that a Subordinate Court has no power to grant bail if there are reasonable grounds for believing that an accused person has been guilty of an offence punishable with death or life imprisonment. The offence of rape carries the penalty of life imprisonment. There are some exceptions when bail may be granted in such cases but these do not apply to this case. The applicant has therefore asked this court to exercise its discretion to grant bail on exceptional and very special reasons.

Before dealing with the merits of this application, there is some preliminary point to consider. The learned deputy public prosecutor has raised the issue whether this application is properly before this court. He contends that the application is in effect an appeal from the refusal of the learned president to grant bail and that therefore these proceedings should be brought by Notice of Appeal under section 394 of the Criminal Procedure Code which reads:

"Any person aggrieved by any order or refusal of any inferior court made under this chapter may appeal to the High Court, which may confirm, vary or reverse the order of such inferior court."

The present application is by Notice of Motion under section 389 of the Criminal Procedure Code which reads:

"The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested, but shall not be excessive; and a judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or court be reduced or increased."

The difference between the two procedures is simply this: If it is an appeal, it will take a longer time to be heard because there has to be a Notice of Appeal and the Subordinate Court will have to state its reasons for refusal before the Petition of Appeal can be filed and eventually heard but if it is an application by Notice of Motion supported by affidavit, it can be made immediately after refusal without notice to the Subordinate Court (but with Notice to the Public Prosecutor) and the application can even be heard by the High Court on the same day or very soon thereafter, speed being the essence of such an application.

There does not appear to be any authority as to which is the proper course to take in such cases. In my view, if a person should not be kept in custody for a moment longer than is necessary then the speedy procedure of section 389 is obviously indicated. But there are other compelling reasons why section 389 is the appropriate procedure. That section gives the High Court absolute discretionary powers to vary bail from time of arrest right up to the time of conviction. It may grant bail when bail has been refused. It may reduce the amount of bail if the amount is excessive. It may increase the amount of bail if the amount is insufficient. But it may not order custody if bail has been granted. The appeal provisions of section 394 of the Criminal Procedure Code, on the other hand, are intended to deal with matters not provided for under section 389 of the Criminal Procedure Code, for instance, if an accused person had been admitted to bail by a Subordinate Court contrary to section 388(i) of the Criminal Procedure Code. As this application arises out of a refusal to grant bail, the provisions of section 389 apply and I accordingly hold that it is properly before this court.

Turning now to the merits of the application the exceptional and very special reasons given are that —

(i) the applicant has a good defence to the charge;

(ii) the applicant is a resident of Kuantan in Pahang and will have great difficulty in preparing his defence, particularly to trace witnesses in that State, if he is kept in custody in a prison in Kuala Lumpur; and

(iii) the applicant has been in custody since August 20, 1975 and would have been in custody for approximately six months before the trial.

Be that as it may, I am of the view that the exceptional and special reasons in this case arise from the fact that the applicant is to be tried by the Sessions Court in the exercise of its special jurisdiction under section 63(3) of the Subordinate Courts Act, 1948. This case may, therefore, be distinguished from *Shanmugam* v. *Public Prosecutor, supra,* because in that case, the applicant was charged before the Subordinate Court for a preliminary enquiry with a view to committal to the High Court whereas in this case, the applicant is before the Subordinate Court for summary trial. The special jurisdiction given to the Sessions Court to try rape cases was conferred by the Courts (Amendment) Act, 1971 which came into force on April 30, 1971. So far only two Presidents of the Sessions Court have been conferred with this special jurisdiction, the Kuala Lumpur President being one of them. This means that in most States, rape cases are still triable by the High Court. Where it is triable by the High Court, bail may be granted pending trial in exceptional cases at the discretion of the judge under section 389 of the Criminal Procedure Code but where it is triable by a President of a Sessions Court with special jurisdiction, no such discretion is conferred on the President. In my view, this is an anomalous position created by increasing the jurisdiction of the President under the Subordinate Courts Act 1948 without making consequential changes to the Criminal Procedure Code. Further, by section 64(1)(b) of the Subordinate Courts Act, the maximum sentence which a President with special jurisdiction may pass is seven years' imprisonment. In rape cases, no power has been given to the Sessions Court to impose the maximum sentence of life imprisonment by the proviso to section 64(1) nor is such a power given by section 64(2) which is restricted to the exercise of powers under section 63(1) but not under section 63(3) of the Subordinate Courts Act. It may be said then that the applicant is no longer charged with an offence punishable with life imprisonment. A consequence of the current state of the law has been that in Kuala Lumpur it is now almost standard practice for persons who are charged before the Special Sessions Court to apply to the High Court for bail pending trial. In most cases, bail is granted particularly in cases when the trial dates are fixed many months after the date of first appearance in court on account of the long list of cases pending at the Special Sessions Court, Kuala Lumpur. As a matter of principle, I think a court that has been conferred with jurisdiction to try a case should also be given discretionary powers to grant bail. This would be in keeping with the provisions of the Criminal Procedure Code, where magistrates possess the unfettered power to grant bail in all cases including cases not triable by them, except offences punishable with death or life imprisonment where only a judge may grant bail. It seems to me that the time has come to consider appropriate amendments to the Criminal Procedure Code enabling a President of a Sessions Court who has been conferred with special jurisdiction the discretionary powers to grant bail in respect of all cases triable by him.

In the instant case, had it been triable by me, I would exercise my discretion to grant bail pending trial. I have no doubt that the learned president would have done the same if he had the power. I would therefore allow this application on exceptional and special reasons and admit the applicant to bail in the sum of $1,000 in one surety to appear at the Special Sessions Court, Kuala Lumpur on February 13, 1976.

Application allowed.

Solicitors: *Manuel & Segran.*

LIEW CHEE YUNG v. CHANG LUN YUAN & ANOR.

[O.C.J. (Gill C.J.) December 17, 1975]
[Muar — Civil Suit No. 15 of 1973]

Tort — Accident — Negligence — Action for damages for personal injuries — Quantum thereof.

Damages — Personal injuries — Leg — Fracture — Wound — Shortening by 1¼ cm.

This was an action for damages for personal injuries suffered by the plaintiff as a result of a road accident caused by the alleged negligent driving of the second defendant. The first defendant was the owner of the motor lorry driven by his servant, the second defendant. The plaintiff had an 8 cm wound over the front of the right leg. There was also a 17 cm long operation scar over the same region. There was about 2.5 cm wasting of the girth of the right calf, with the result that he walked with a definite limp. He was able to squat and rise up reasonably well but he could not run easily. There was some outward bowing of the right leg caused by the shortening of the leg by 1¼ cm. There was restriction of movements in the right ankle and foot. The movement in the right ankle was only half the normal range and the main limitation was in dorsiflexion. There was no eversion and inversion at the subtalar joint was only half the range. It was very likely that osteoarthritis would develop in the ankle joint over the years.

Held: (1) on the facts the second defendant was entirely to blame for the accident;

(2) the plaintiff should be allowed general damages at $14,000 and special damages in the sum of $13,450.

Case referred to:-

(1) *Romford Ice and Cold Storage Co. Ltd.* v. *Lister* [1955] 3 All E.R. 460.

CIVIL SUIT.

S. C. Chan for the plaintiff.

Thakurta for the first defendant.

Abdul Razak bin Ahmad for the second defendant.

Gill C.J. (Malaya): This was an action for personal injuries suffered by the plaintiff in a road accident involving motor lorry No. JF. 8601, which belonged to the first defendant and was being driven by the second defendant as his servant at the time of the accident.

The accident occurred at the 51st mile along Ayer Hitam/Simpang Rengam on November 14, 1969 at about 1 p.m. when the lorry was travelling in the direction of Simpang Rengam. The plaintiff was also